FILED
MAR 25 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. [redacted] 40

SAMUEL R. SNYDER, Administrator of the Estates of RENEE DENISE SNYDER and KAYE ERIN SNYDER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN GEYER TAUSIG,
Attorney for Petitioner
BUTLER, KOEHLER & TAUSIG
Investment Building
Washington 5, D. C.

SMITH, RISTIG & SMITH,
815 15th St. N. W.
Washington 5, D. C.
Of Counsel.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit, which set aside as excessive the judgments of the United States District Court for the District of Maryland, wherein petitioner had been awarded $8000 damages for the wrongful death of each of his children.

I.

OPINIONS OF THE COURTS BELOW

The opinion of Chief Judge William C. Coleman of the United States District Court for the District of Maryland in "Snyder, Adm'r. v. United States (two cases)" and

companion cases is reported in 118 F. Supp. 585. The Per Curiam opinion of the United States Court of Appeals for the Fourth Circuit in "United States of America, Appellant, v. Samuel R. Snyder, Administrator of the Estate of Renee Denise Snyder, deceased, Appellee" and "United States of America, Appellant v. Samuel R. Snyder, Administrator of the Estate of Kaye Erin Snyder, deceased, Appellee" and companion cases is reported in 218 F.2d 266. The pertinent parts of the District Court's opinion are set forth on pages 96 through 99 of the appendix record, nine copies of which have been filed herein. The Per Curiam opinion of the Court of Appeals is printed as an appendix to the petition, ante.

II.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Review is sought of the judgments of the United States Court of Appeals for the Fourth Circuit in Nos. 6863 and 6864. These judgments are dated December 28, 1954 and were entered on the docket of the Court of Appeals on that date. The judgments in question, showing thereon the date of their entry, are printed as an appendix to the petition, ante.

The Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. § 1254(1), and 62 Stat. 961, as amended May 24, 1949, c. 139, § 106, 63 Stat. 104, 28 U.S.C.A. § 2101(c), is believed to confer on this Court jurisdiction to review the judgments in question by writ of certiorari.

III.

QUESTIONS PRESENTED FOR REVIEW

1. When the only contention made by the defendant in a federal district court and in a federal appellate court is that under the applicable wrongful death statute (Maryland) nominal damages only are recoverable for the death of an infant, and that for this reason the district court's award of $8000 damages is excessive as a matter of law, and both the district court and appellate court reject that contention, and the defendant has not moved in the district court for a new trial on the ground that the award is excessive in fact, does the appellate court have the power under Rule 52(a) of the Federal Rules of Civil Procedure to review the award for excessiveness in fact?

2. If the federal appellate court has the power to review, does it have the power under Rule 52(a) to set aside as excessive and, therefore, "clearly erroneous", the district court's finding that as a result of an infant daughter's death the parents suffered $8000 damages, when the only matters in the record bearing upon the question of damages were (1) uncontradicted testimony that in the parents' community numerous female high school graduates each earn $9100 in secretarial positions before attaining majority, which testimony was held to be of "no probative value" by the appellate court, and (2) statistics of the United States Department of Labor, which provided the formula for comparing the relative purchasing power of the 1953 dollar with the purchasing power of the dollar in any previous year back to 1820, and (3) a summary of all verdicts rendered in and approved by the Baltimore City Superior Court and Baltimore City Court for the wrongful death of minors during the years between 1935 to 1942, upon which summary it was shown that the average amount of the verdicts translated into the 1953 dollar is $8,226, and (4) the only three awards

for the wrongful death of a child in Maryland, known to have been reported in opinions of the Court of Appeals for the State of Maryland and United States District Court for the District of Maryland, which awards, translated into the 1953 dollar and added to the summary of verdicts mentioned above, raise the average amount of the verdicts to $8,478, and (5) the age of the decedent?

IV.

STATUTES AND RULES INVOLVED

These cases involve the Federal Tort Claims Act, the Maryland wrongful death statute, and Rules 52(a) and 59(a) of the Federal Rules of Civil Procedure, the pertinent parts of which are set forth below:

Act of June 25, 1948, c. 646, 62 Stat. 983, 28 U.S.C.A. § 2674.

"The United States shall be liable, respecting provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances • • •."

Section 1, Article 67, Annotated Code of the Public General Laws of Maryland (1951 Ed.).

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued • • • shall be liable to an action for damages, notwithstanding the death of the person injured • • •."

Federal Rules of Civil Procedure, 28 U.S.C.A. following § 2680.

Rule 52(a). "In all actions tried upon the facts without a jury • • • the court shall find the facts specially • • •. Findings of fact shall not be set aside unless clearly erroneous • • •."

Rule 59(a). "A new trial may be granted to all or any of the parties and on all or part of the issues • • • in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, • • • amend findings of fact • • • or make new findings • • • and direct the entry of a new judgment."

V.

STATEMENT OF THE CASE

Renee Denise Snyder, age 8 weeks, and Kaye Erin Snyder, age 6½ years, were killed when an airplane of the United States Air Force crashed into their parents' house in Morningside, Maryland. Pursuant to the provisions of the Federal Tort Claims Act of June 25, 1948, c. 646, 62 Stat. 933 and 937, as amended, 28 U.S.C.A. §§ 1346(b) and 1402(b), their father, Samuel R. Snyder, as Administrator of their respective estates, commenced civil actions to recover from the United States of America for the wrongful deaths of his intestates. (R. 2-7)[1]. At the trial of these actions in the United States District Court for the District of Maryland, the defendant conceded actionable negligence and did not contest the plaintiff's claim for funeral expenses incurred for each intestate in the amount of $147.50 (118 F. Supp. at p. 588 and 592).

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[1] R. references are to appendix record, nine copies of which have been filed with this Court.

Under the provisions of the Federal Tort Claims Act, 28 U.S.C.A. § 2674, the District Court was governed by Section 1, Article 67, Annotated Code of the Public General Laws of Maryland (1951 Ed.), in determining the damages resulting from these wrongful deaths. The Court of Appeals for the State of Maryland had so construed Section 1 of Article 67 that the District Court "in estimating the damages * * * [was] confined to the pecuniary damages sustained by" the parents of the deceased children as the result of their wrongful deaths.

In the District Court it was contended on the Administrator's behalf that substantial "pecuniary damages" should be awarded (Tr. 355-357; 118 F.Supp. at p. 593).[2] In support of this contention, Richard C. Darnell, the owner of one of the two largest employment agencies in the District of Columbia, testified that he had obtained secretarial positions for numerous female high school graduates, who had majored in commercial courses, and that the earnings of each of these women averaged $9100 for the 3-year period between their 18th and 21st birthdays. (R. 26-31). This testimony was admitted over the objection of the defendant, which claimed that it was "purely speculative" and, therefore, should be excluded. In further support of the Administrator's claim, there were introduced in evidence statistics of the United States Department of Labor, through which the relative purchasing power of the 1953 dollar could be compared with the purchasing power of the dollar in any previous year back to 1820 (Tr. 136, 137, 288-294). Then there was placed in the record a summary of all verdicts found to have been rendered for the wrongful death of children in the Baltimore City Superior Court and the Baltimore City Court during the years 1935 through 1942. On this summary it was shown that the average amount of these verdicts,

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[2] Tr. references are to the original record, which has been filed with this Court.

when translated into the 1953 dollar, is $8,226. (R. 120). In calling the District Court's attention to the summary, the Administrator's attorney explained that the $8,226 average had been computed from Department of Labor statistics introduced in evidence. (Tr. 397-401). The Administrator's attorney also called the District Court's attention to the fact that he could find only two opinions of the Court of Appeals for the State of Maryland and only one opinion of the United States District Court for the District of Maryland, in which the amount of an award for the wrongful death of a child in Maryland is reported and that these awards, translated into the 1953 dollar, amounted to $17,211 for an 11-year old boy (*Western Union Telegraph Co.* v. *State, Use of Nelson*, 83 Md. 293 (1896)), $6,090 for a 7-year old girl (*American Express Co.* v. *State, Use of Denowitch*, 132 Md. 72 (1916)) and $4,447 for a 10-year old boy (*State, Use of Pryor* v. *Miller*, 180 F. 796 (1910)), respectively. (Tr. 362, 357, 378). When these three awards are added to the summary of verdicts referred to above, the average amount of all the awards, translated into the 1953 dollar, is $8,478.

The defendant placed nothing in the record bearing on the question of damages. However, it claimed that under the Maryland wrongful death statute nominal damages only were recoverable for the death of the Snyder children. (Tr. 355). The theory urged in support of this claim was that the parents' costs of raising each child to majority must be estimated and offset against the estimated value of the child's services and the estimated amount of money she would have earned during minority, that these costs must equal or exceed the value of the services and earnings and, accordingly, that there could be no "pecuniary damages" to the parents within the meaning of the Maryland wrongful death statute. (Tr. 350).

The District Court's judgments awarded the Adminis-

trator $8000 "pecuniary damages" for the wrongful death of each child and $147.50 for funeral expense for each child. (R. 107-110). without filing a motion for a new trial on the ground that the judgments were excessive in fact, the defendant appealed from the judgments. On appeal it merely reasserted its theory as to the manner in which the "pecuniary damages" under the Maryland wrongful death statute must be determined and reasserted the conclusion based thereon that the judgments must be excessive as a matter of law, since they awarded more than nominal damages. Accordingly, the appellant demanded that the judgments be set aside as "clearly erroneous" under the power granted the federal appellate courts by Rule 52(a) of the Federal Rules of Civil Procedure (See appellant's brief, pp. 12-19). The appellee defended the judgments on the merits and maintained that the appellate court had no power to review the judgments for excessiveness, because appellant had not moved for a new trial and thus called this claimed error to the trial court's attention. (See appellees' brief pp. 4-9).

At the outset of oral argument in the Court of Appeals, Chief Judge Parker announced that the Court had decided that it did have the power to review the District Court's judgments for excessiveness and that no oral argument on the question would be permitted. The Court then heard oral argument in support of appellant's contention that the $8000 judgments were excessive as a matter of law, because nominal damages only were recoverable under the Maryland wrongful death statute for the death of the Snyder children. Thereupon, Judge Parker requested the Administrator's attorney to state why he believed the Court of Appeals should hold that the judgments were not excessive. The attorney replied there were many reasons, as set forth in the appellees' brief, but that he believed the most important of these was that, if the Court of Appeals held the $8000 judgments

to be excessive, it would involve a holding that the average award for the wrongful death of a child, as obtained from the aforementioned cases of the Baltimore City Superior Court, Baltimore City Court, Court of Appeals for the State of Maryland and the United States District Court for the District of Maryland was excessive. Judge Parker immediately stated that he was satisfied the $8000 judgments were reasonable and ordered the attorney to proceed to his oral argument in support of the District Court's judgments in companion cases, Nos. 6865 and 6866, which are not involved in this petition.

On December 28, 1954 the Court of Appeals for the Fourth Circuit entered judgments reducing each award in favor of the Administrator from $8,147.50 to $5,147.50. (Appendix to petition, ante).

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Court of Appeals for the Fourth Circuit held that the Federal Rules of Civil Procedure conferred upon it the power to review for excessiveness in fact the damages awarded by a federal district court, sitting without a jury, although the defendant had not brought the claimed error of excessiveness in fact to the attention of the trial judge during the course of the trial and had not submitted the matter of setting aside the award to the discretion of the trial judge by a motion for a new trial. In so holding the Court of Appeals has rendered a decision in conflict with the decisions of the Court of Appeals for the Fifth Circuit in *Hutches* v. *Renfroe*, 200 F.2d 337, and the Court of Appeals for the Ninth Circuit in *United States* v. *Fotopulos*, 180 F.2d 631. This decision of the Court of Appeals for the Fourth Circuit also appears to be in conflict with the decisions of the Court of

Appeals for the First Circuit *in United States* v. *Grigalauskas*, 195 F. 2d 494, the Court of Appeals for the Fifth Circuit in *Komer* v. *Shipley*, 154 F.2d 861, and the Court of Appeals for the Eighth Circuit in *Kansas City Stockyards Co. of Maine* v. *Anderson*, 199 F.2d 91. Moreover, the decision of the Court of Appeals for the Fourth Circuit has decided an important question of federal law, which has not been, but should be decided by this Court.

2. The Court of Appeals for the Fourth Circuit set aside $8000 awards for the "pecuniary damages" suffered by parents as a result of the wrongful death of each of their children of tender age, holding that the awards were so excessive as to be "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, because the parents' reasonable expectation of pecuniary benefit from each child's life could not exceed $5000, *in the judgment of the Court of Appeals.*[3] In taking this action the Court of Appeals for the Fourth Circuit has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, for in taking this action the Court of Appeals exceeded the power conferred upon it by Rule 52(a), as that power is defined by this Court in *United States* v. *U. S. Gypsum Co.*, 330 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746; by the Court of Appeals for the First Circuit in *United States* v. *Grigalauskas*, supra; by the Court of Appeals for the Fifth Circuit in *Sanders* v. *Leech*, 158 F.2d 486; by the Court of Appeals for the Sixth Circuit in *Wright-Bernet* v. *Commissioner of Internal Revenue*, 172 F.2d 343; by the Court of Appeals for the Seventh Circuit in *In Re 32-36 North State St. Bldg. Corporation*, 164 F.2d 205; by the Court of Appeals for the Eighth Circuit in *Aetna Life Ins. Co.* v. *Kepler*, 116 F.

[3] Emphasis throughout this petition is that of petitioner's attorney.

2d 1; *Nee, Collector of Internal Revenue* v. *Linwood Securities Co.*, 174 F.2d 434; *Brink's Inc.* v. *Hoyt*, 179 F.2d 355; and *Kansas City Stockyards Co. of Maine* v. *Anderson*, supra; and the Court of Appeals for the Ninth Circuit in *United States* v. *Fotopulos*, supra.

VII.

ARGUMENT

A.

What Power Does a Federal Appellate Court Have to Set Aside a Verdict as Excessive?

Decisions of this Court [4] and decisions of the Courts of Appeals for the Second, Fifth, Eighth, Tenth and District of Columbia Circuits [5] are authority for the principles that (1) it is beyond the power of a federal appellate court to set aside a jury verdict for excessiveness unless the question of setting it aside has been submitted to the trial judge on a motion for a new trial and that (2), even after such submission, the federal appellate court may review the denial of the motion and set aside the verdict only for errors of law, as when the verdict exceeds the maximum recovery permitted by statute.

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[4] *Wilson* v. *Everett*, 139 U.S. 616, 621, 11 S.Ct. 664, 35 L.Ed. 286; *Southern Railroad Co.* v. *Bennett*, 233 U.S. 80, 34 S.Ct. 566, 58 L.Ed. 860; *Fairmount Glass Works* v. *Coal Co.*, 287 U.S. 474, 481, 53 S.Ct. 566, 58 L.Ed. 860.

[5] (2 Cir.) *Powers* v. *Wilson*, 110 F.2d 960; *Caloric Corp.* v. *Chemical Bank & Trust Co.*, 205 F.2d 492; *Stevenson* v. *Hearst Consol. Publications*, 214 F.2d 902; (5 Cir.) *Sunray Oil Corporation* v. *Allbritton*, 188 F.2d 751; *Capella* v. *Zurich General Acc. Liability Ins. Co.*, 194 F.2d 588; (8 Cir.) *St. Louis Southwestern Ry. Co.* v. *Ferguson*, 182 F.2d 949; *Missouri-K.-T. R. Co. of Texas* v. *Ridgway*, 191 F.2d 363; (10 Cir.) *Marshall's U. S. Auto Supply Inc.* v. *Cashman*, 111 F.2d 140; (D. C. Cir.) *Washington Times Herald Co.* v. *Bonner*, 66 App.D.C. 280, 293, 86 F.2d 826; *Frasca* v. *Howell*, 87 App. D.C. 53, 182 F.2d 703.

Decisions of all the other Circuit Courts of Appeals are also authority for the first principle of law set forth above.[6] But these same decisions are in conflict with the aforementioned decisions of this Court and the Courts of Appeals for the Second, Fifth, Eighth, Tenth and District of Columbia Circuits on the second principle of law set forth above. They hold that where a jury's verdict is not excessive as a matter of law but a motion for a new trial is made on the ground that it is excessive as a matter of fact, and the trial judge denies the motion, a federal appellate court has the power to review this exercise of the trial court's discretion and, if the appellate court is able to hold that the verdict is "grossly excessive", "inordinate in amount" or "shocking to the conscience", it then has the power to declare that the denial of the motion for new trial was an abuse of discretion and to remand the case for a new trial. Despite the fact that in *St. Louis Southwestern Ry. Co.* v. *Ferguson*, supra, at p. 955, the Court of Appeals for the Eighth Circuit said that in *Affolder* v. *New York, Chicago & St. L. R. Co.*, 339 U.S. 96, 101, 70 S. Ct. 509, 94 L.Ed. 683, this Court had mistakenly assumed that the Court of Appeals had scrutinized the amount of the damages, some of the latest of these same decisions have found support for their view of the law from the implication in the follow-

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[6] (1 Cir.) *McCoy* v. *Cate*, 117 F.2d 194; (3 Cir.) *Trowbridge* v. *Abrasive Co. of Philadelphia*, 190 F.2d 825, 830; *Brest* v. *Philadelphia Transportation Company*, 216 F.2d 331; (4 Cir.) *Carter Coal Co.* v. *Nelson*, 91 F.2d 651, 654; *Virginian Ry. Co.* v. *Armentrout*, 166 F.2d 400, 407; *Ford Motor Co.* v. *Mahone*, 205 F.2d 267, 272; (6 Cir.) *Reisberg* v. *Walters*, 111 F.2d 595; *Spero-Nelson* v. *Brown*, 175 F.2d 86; *Sebring Trucking Co.* v. *White*, 187 F.2d 486; *Dixie Greyhound Lines* v. *Woodall*, 188 F.2d 535; *Werthan Bag Corp.* v. *Agnew*, 202 F.2d 119; (7 Cir.) *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, 191 F.2d 302; *Flener* v. *Louisville & N. R. Co.*, 198 F.2d 77; *Bucher* v. *Krause*, 200 F.2d 576; (9 Cir.) *Southern Pacific Co.* v. *Guthrie*, 186 F.2d 926; *Covey Gas & Oil Co.* v. *Checketts*, 187 F.2d 561.

ing language used by this Court in its Affolder opinion:

> "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."

The rationale of all these decisions is expressed clearly in the cited cases of the Court of Appeals for the Fourth Circuit; they explain that a federal appellate court may hold the amount of a verdict to be "grossly excessive", "inordinate in amount", or "shocking to the conscience", when the amount is manifestly without support in the evidence or there is no reasonable basis in the record to justify it; in such circumstances, they say a federal appellate court has the power to reverse the trial judge's denial of the motion for a new trial, for the reversal is based on error of law rather than on error in fact, just as a federal appellate court's reversal of a trial judge's denial of a motion for a directed verdict is based on error of law, when there is insufficient evidence to take the case to the jury.

However, the federal appellate courts rendering these decisions hasten to point out therein that in order to remand for a new trial, there must be a very clear and grave abuse of discretion and that such an abuse is not shown merely because the federal appellate court would not have awarded such a large amount if it had been the trier of facts. Stating it another way, these same decisions hold that it would be a usurpation of judicial authority for a federal appellate court to substitute its judgment for the judgment of the trial judge on the question of the excessiveness of a verdict, when the claimed excessiveness is merely one of judgment as to the amount proved by the evidence.

B.

What Power Does a Federal Appellate Court Have to Set Aside as Excessive a Finding of Damages Made in a Non-Jury Case?

As stated by the Court of Appeals for the Fifth Circuit in *Sanders* v. *Leech*, supra, and the authorities collected therein, prior to the adoption of the Federal Rules of Civil Procedure the two principles of law enunciated in the cases set forth in footnotes 4 and 5 of this petition, applied "with equal vigor to awards of damages made in trial courts in law cases tried without a jury.". It is the contention of the petitioner that under Rule 59(a) of the Federal Rules of Civil Procedure the first principle and, under Rule 52(a) of said Rules, the second principle as modified by the cases set forth in footnote 6 of this petition, continue to apply with equal vigor to awards of damages made by a federal trial judge in each civil action tried without a jury, whether such action be one that was formerly denoted a law case or an equity case. On the basis of this contention, the petitioner asserts that, since the defendant in the cases at bar failed to move for a new trial on the ground that the damages awarded by the trial judge were excessive in fact, the Court of Appeals had no power to review the awards for excessiveness in fact. And, if the Court of Appeals had such power of review, nevertheless, it was without authority to set aside the awards as "clearly erroneous", because the record affords no basis for such action.

The Federal Tort Claims Act requires that all cases arising thereunder shall be tried by a United States District Court without a jury. 28 USCA § 2402. In *United States* v. *Grigalauskas*, supra, the United States appealed from a judgment entered against it in a case arising under the Federal Tort Claims Act. The only question presented on the appeal was "Whether the finding of the trial court that the infant appellee's damages amount-

ed to $94,650 was so grossly excessive that it is 'clearly erroneous' and should, therefore, either be reversed and remanded for a new trial on the quantum of damages or, in the alternative, be reduced by the imposition of a substantial remittitur.". In affirming the judgment the Court of Appeals for the First Circuit said:

> "The defendant's motion for a new trial was based on various grounds, including the very same point upon which this appeal is based, i. e., the claim that the amount awarded is 'patently excessive'. This motion was denied on June 29, 1951. *The record does not convince us that the court abused its discretion in the denial of this motion. McCoy* v. *Cate,* 1 Cir., 117 F.2d 194.
>
> • • • •
>
> Rule 52(a), F.R.C.P., 28 U.S.C. provides in part: '• • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. • • •'.
>
> • • • •
>
> It was not necessary in the instant case for the court to reveal the method in assessing unliquidated damages. See *Ginsburg* v. *Royal Ins. Co.,* 5 Cir., 179 F.2d 152. *The damages awarded by the district court's judgment is not 'monstrous', 'outrageously excessive' or shocking to the conscience of the court from all the facts and circumstances disclosed in the record. Affolder* v. *N.Y., C. & St. L. R. Co.,* • • • *United States* v. *Fotopulos,* • • • We find no merit in any of the defendant's contentions."

In *Komer* v. *Shipley,* supra, the defendant appealed from a $7,500 judgment rendered for the plaintiff by the court, sitting without a jury. Prior to the appeal the defendant had filed a motion for a new trial on the ground that the $7,500 award for personal injuries was grossly excessive. In affirming the judgment the Court of Appeals for the Fifth Circuit stated:

> "Finally, the defendant contends that the judgment for $7500 was grossly excessive under the evidence in this case. *Since the evidence in the record supports the finding, we will not disturb it.*"

In *Hutches* v. *Renfroe,* supra, the issue on appeal was the measure of damages to which plaintiff was entitled for defendant's breach of contract. The plaintiff had filed a motion to amend the judgment rendered by the trial court, sitting without a jury, on the ground that the trial judge had committed an error of law in failing to apply the proper legal measure of damages. The motion was denied and plaintiff appealed. The Court of Appeals for the Fifth Circuit had this to say:

> "• • • Defendant argues that if plaintiff was dissatisfied with the amount of his recovery, his remedy was by motion for a new trial under Rule 59 of the Rules of Civil Procedure, 28 U.S.C.A., and not by motion to amend the judgment under Rule 59. • • • we think that perhaps the plaintiff should have used the motion for a rehearing under Rule 59 to call the error to the attention of the court. However, whether he should have proceeded under Rule 59(a) is unimportant. Surely, the parties are not to be hamstrung in the Federal Courts by such trivial distinctions without differences. *The important point is that the error was called to the attention of the trial court and it refused to grant the relief to which the appellant was entitled.*"

It is true that the principle of law set forth in the Hutches case does not appear to have been adhered to consistently by the Court of Appeals for the Fifth Circuit. That is, it does not appear from the proceedings reported in *Sanders* v. *Leech,* supra, and *U.S.A.C. Transport* v. *Corley,* 202 F.2d 8 (5 Cir.), that plaintiff in either case had moved for a new trial. Nevertheless, in each case the Court of Appeals for the Fifth Circuit considered and rejected on the merits the contention that the damages for personal injuries awarded by the trial court, sitting with-

out a jury, were so inadequate as to "shock the conscience" and, therefore, were "clearly erroneous" within the meaning of Rule 52(a). In rejecting that contention in the Sanders case the Court of Appeals held:

> "As to plaintiffs' appeal, while we do not agree with the defendants' general proposition, that in suits for damages tried to a court without a jury the judge's findings of fact are conclusive on appeal, we do think it quite plain that the judgment in this case may not be reversed. The rule invoked by defendants, that in an action at law the question of the amount of damages is a question of fact to be settled in the trial court and cannot be reexamined in the appellate court for excessiveness or insufficiency, has always been and still is in jury cases, because of the 7th Amendment, an absolute rule. Prior to the adoption of the New Federal Rules of Procedure, 28 U.S.C.A. following section 723c, it applied by force of statute with equal vigor to awards of damages made in trial courts in law cases tried without a jury. Since their adoption, however, all findings of fact, and this includes findings as to damages, made by a trial court on waiver of jury are reviewable in this court, subject to the provisions of Rule 52(a) that 'Findings of fact shall not be set aside unless clearly erroneous.' Under that rule, as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding. *It may reverse*, though, under the rule (1) *where the findings are without substantial evidence to support them;* (2) *where the court misapprehended the effect of the evidence;* and (3) *if*, though there is evidence which if credible would be substantial, *the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.*

In examining the record in this case in the light of these views, it must be borne in mind that what

is brought in question here is not whether in determining the existence of a fact or facts, the trial court correctly apprehended and announced the effect of the evidence. It is whether in awarding unliquidated damages in this case the district judge, in drawing demanded or permissible inferences from the evidence and in making the determination as to the extent of the injury and the sum in money which if paid in hand will fairly compensate the plaintiff for his injury, fairly and reasonably exercised his discretion and wisely and justly gave judgment in the cause.

• • • •

In so far as plaintiff asks us to increase and affirm the judgment, he is asking us, in a case here for review of errors and not for trial de novo, to assume the role of the trial judge, a role we may not play. In so far as he asks us to reverse the judgment with directions to the trial judge to itemize and increase the damages awarded, *he is asking us to find on evidence which does not afford any definite basis for such determination that the finding of the judge awarding damages was clearly erroneous.*

In these circumstances it is not our duty to determine whether, if we were triers, we would have awarded damages in the same, a greater, or a less amount. It is our duty to determine only whether we can say that the amount awarded was so inadequate that it was clearly erroneous, that is unjust. The evidence furnishes no basis for determination that it was."

Moreover, it is apparent from *In Re Texas City Disaster Litigation*, 197 F.2d 771 (5 Cir.), that the Court of Appeals for the Fifth Circuit believes that the construction it placed upon Rule 52(a) in the Sanders case is precisely the same construction placed upon that Rule by the Supreme Court in *United States* v. *U. S. Gypsum Co.*, supra. At page 783 of the report of the Texas City Disaster case, the Court of Appeals said:

"• • • In support of this view, the appellant insists: that the force and effect of the testimony, con-

sidered as a whole is convincing that the findings are so against the great preponderance of the credible evidence that they do not reflect, or represent, the truth and right of the case. *Sanders* v. *Leech*, * * *. Or, putting it as the Supreme Court has put it in *United States* v. *U. S. Gypsum Co.*, * * *, *'A finding is "clearly erroneous" when* although there is evidence to support it, *the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"*

In *Wright-Bernet* v. *Commissioner of Internal Revenue*, supra, the Court of Appeals for the Sixth Circuit held:

> "As the payments were unquestionably 'purely for services' * * * the single question before the Tax Court was the reasonableness of the compensation. This, of course, is a question of fact.
>
> In considering this question we have jurisdiction to review the decision of the Tax Court in the same manner and to the same extent as a decision of the District Court in civil actions without a jury. * * * * * * in reviewing decisions of the Tax Court, we not only are to decide questions of law, but are to consider the findings of fact. *Aetna Life Ins. Co.* v. *Kepler*, 8 Cir., 116 F.2d 1, 4. As stated in that case: 'Prior to the effective date (September 16, 1938) of the Rules of Civil Procedure, the findings of fact of a trial court, in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and, unless clearly against the weight of the evidence or induced by an erroneous view of the law, would not be disturbed by a reviewing court. * * *
>
> 'The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.

'This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals. *'The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court.'*"

In *In Re 32-36 North State St. Bldg. Corporation*, supra, the appellants alleged that the allowances of fees to the trustee and to counsel in a bankruptcy proceeding were excessive. In refusing to set the allowances aside, the Court of Appeals for the Seventh Circuit held:

"At the outset it is well to remember that allowance or denial of fees in a reorganization proceedings is a matter within the broad discretion of the bankruptcy court; that the appellate court does not try de novo the issue of reasonable compensation and that *the judgment of the trial court will not be disturbed on appeal unless it clearly appears that there is no basis in the evidence for the conclusion reached or that the court proceeded upon an erroneous conception of the law. In other words, the appellate court is powerless in such cases to substitute its judgment for that of the trial tribunal unless there appears an abuse of discretion amounting to manifest disregard of right and reason.* • • •

• • • •

Appellants insist that the reference to a Master removed this case from the category of those in which the trial court's judgment must be affirmed unless clearly erroneous, as provided by Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c. But by Rule 53(e), masters' reports and by General Order in Bankruptcy 47, 11 U.S.C.A. following section 53, 305 U.S. 702, referees' and special masters' reports in bankruptcy, are to be considered in the same light."

In footnote 3 to that portion of the opinion of *Aetna Life Ins. Co.* v. *Kepler,* supra, quoted in *Wright-Bernet* v. *Commissioner of Internal Revenue,* supra, the Court of Appeals for the Eighth Circuit noted:

> "The Advisory Committee which assisted in drafting the new rules had this to say of the above quoted portion of Rule 52(a):
>
> 'The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.' (Note to Rule 52(a), 28 U.S.C.A. following section 723c).
>
> Honorable William D. Mitchell, Chairman of the Advisory Committee, on October 27, 1938, in a lecture on the new rules, said with reference to this rule: 'In subdivision (a) we find a very important rule. Findings of fact, that is, findings by a judge where a jury is waived or there is no right to a jury, shall not be set aside unless clearly erroneous, due regard being given to the opportunity of the trial court to judge the credibility of witnesses. Under the former federal system, a statute provided that where a jury is waived the findings of the court have the effect of a verdict and may not be set aside if there is substantial evidence to support them, whereas in equity practice the findings of a trial judge could be set aside on an appeal if clearly erroneous, due regard being given to the opportunity of the trial judge to pass on the credibility of the witnesses. You had these two different rules under the old system. When uniting law and equity procedure it is desirable to have one rule applicable to all cases tried on the facts by a judge, so as to avoid preserving the distinction betweeen law and equity cases. The Advisory Committee had the choice of recommending that the findings of the trial judge should be tested by the old rule

applied in law cases where a jury was waived, or by the equity rule. We recommended the equity system be adopted, so now when a case is tried on the facts by a judge it makes no difference whether the case is one formerly cognizable at law or in equity. His findings have the same weight in both types of actions and can be set aside if clearly erroneous. *They can be set aside if against the clear weight of evidence, even though there is some evidence that might support a verdict or findings in a law case under the old system.'* (Rules of Civil Procedure, Annotated, Appendix, page 199.)"

In *Nee, Collector of Internal Revenue,* v. *Linwood Securities Co.,* supra, the Collector appealed from a judgment obtained by the plaintiff in a non-jury action to recover income taxes wrongfully collected. In affirming the judgment the Court of Appeals for the Eighth Circuit states:

"That the trial court could have viewed the facts differently, or that we might perhaps have done so, if we had been the initial trier thereof, does not alone entitle us to reverse. *Under Rule 52(a) and its interpretation in the United States Gypsum Co. case, there must exist a stronger basis for overthrowing a finding of fact than a mere difference in personal judgment. Such evidentiary weight and such convictional certainty must be present that the appellate court does not feel able to escape the view that the trial court has failed to make a sound appraisal of or to accord the proper effect to all of the cogent facts,* giving due regard, of course, to the trial court's appraisal of witness credibility, where that factor is involved.".

In *Brink's, Inc.* v. *Hoyt,* supra, the plaintiff sought reversal of the judgment, rendered in his favor in a non-jury action, upon the ground that the $500 compensatory damages awarded him were grossly inadequate. In affirming the judgment, the Court of Appeals for the Eighth Circuit stated:

> "• • • The action was to recover unliquidated damages. • • • Appellate Federal Courts may not on appeal set aside verdicts or judgments because against the weight of the evidence. *The only review that can be had as to the findings of fact by a jury or a court in a jury-waived case is as to whether there is substantial competent evidence to support it. This presents a pure question of law and we can go no further.*"

It does not appear that before taking the appeal the plaintiff had moved for a new trial in the District Court. But, under the teaching of *Hutches* v. *Renfroe*, supra, it was not necessary for him to do so in order to preserve his right of appeal. The opinion of the Court of Appeals in *Brink's* case shows that the claimed error had been called to the attention of the trial judge during the trial, the plaintiff contending therein that his evidence had established a liquidated loss of $2,902.

In *Kansas City Stockyards Co. of Maine* v. *Anderson*, supra, the plaintiff cross-appealed from a judgment awarding him $2,000 for personal injuries. His case had been tried to the court, sitting without a jury. On appeal he contended that the trial court abused its discretion in denying his motion for a new trial grounded on the claim of inadequacy of damages. In disposing of this contention the Court of Appeals for the Eighth Circuit held:

> *"This court will not review the action of the trial court in granting or denying a motion for a new trial for alleged error of fact. Such a motion is addressed to the discretion of the trial court.* • • • *Fairmount Glass Wks.* v. *Cub Fork Coal Co.*, • • •."

In *United States* v. *Fotopulos*, supra, the United States claimed on appeal that the $50,000 damages awarded against it by the trial judge in an action arising under the Federal Tort Claims Act were excessive in fact. In rejecting that contention the Court of Appeals for the Ninth Circuit held:

"No motion for a new trial was made. The trial court was not given the opportunity to consider the contention now made that the award is excessive. That is, ordinarily, a ground for new trial, which the trial court may grant outright or condition upon reduction of verdict. Rule 59, Federal Rules of Civil Procedure. • • • *Except under extraordinary circumstances, which do not obtain in this case, appellate courts will not review judgments for excessiveness or reduce them."* • • •

• • • •

"An award of damages to a widow and two small children for the loss of the head of the family with such expectancy, engaged in a successful business, with good earning capacity, *is not so 'outrageously excessive' as to call for interference by this court.".*

C.

The Act of Setting Aside the $8000 Judgments Was An Unauthorized, Arbitrary Assumption and Exercise of Judicial Power.

From the foregoing it is clear that prior to the adoption of the Federal Rules of Civil Procedure, a finding as to damages made in a law case by a federal trial court sitting without a jury, had the effect of a verdict for damages. In other words, the matter of setting aside such a finding for excessiveness lay wholly within the discretion of the federal trial court. In the absence of abuse of that discretion, the federal appellate court was powerless to review the finding for excessiveness. Stated another way, if the matter of setting aside the finding as excessive had not been addressed to the trial court on a motion for a new trial, the federal appellate court was powerless to act. In the cases at bar the Court of Appeals for the Fourth Circuit announced:

"• • • although there has been some discussion in the briefs and at the bar with regard to our power to

> review the findings of the lower court as to damages, we think there can be no doubt as to our power and our duty to review these as we do other findings of fact in cases tried by a judge without a jury."

This pronouncement involves a holding that the Federal Rules of Civil Procedure dispensed with the necessity of moving for a new trial on the ground that the finding of damages made by a federal trial judge, sitting without a jury, is excessive. Which is to say, the matter of setting aside such a finding no longer need be addressed to the discretion of the trial court and may be reviewed by a federal appellate court despite the fact that the claimed error has not been called to the attention of the trial court and the trial court has not been given a fair chance to correct it. The Court of Appeals for the Fourth Circuit so held with full knowledge of the fact that prior to the adoption of the Federal Rules of Civil Procedure it had repeatedly held that in law cases it had no power to review the sufficiency of the evidence to support a finding made by a federal trial court, sitting without a jury, unless a motion to set aside the finding had been addressed to the discretion of the trial court, which motion was not reviewable in the absence of abuse. *Peoples Bank* v. *International Finance Corp.*, 30 F.2d 46; *Pocahontas Coal and Coke Company* v. *Cook*, 74 F.2d 878; *Union Bleachery* v. *United States*, 79 F.2d 549.

However, Rule 59(a) of the Federal Rules of Civil Procedure does not do away with but, to the contrary, emphasizes the necessity of a motion for a new trial to preserve for appellate review the question whether damages awarded in an action tried without a jury are excessive. The Rule provides that in an action tried without a jury a motion for a new trial may be granted to correct any error that, prior to the adoption of the Federal Rules of Civil Procedure, was correctable by means of a petition for a rehearing in suits in equity in courts of the United

States. In Hughes, *Federal Practice, Jurisdiction & Procedure*, (1931), Volume 7, Section 4481, page 214, (and the authorities collected therein) it is shown that under former Equity Rule 69:

> "Any mistake of the court in applying the law or the facts of the case may be corrected by means of a petition to rehear * * *; rehearings in equity being allowable * * * upon practically the same grounds and considerations as govern applications for new trial at law. * * * Rehearings after a decree are not a matter of right, but rest in the sound discretion of the court, and the exercise of such discretion is not arbitrary, but is governed by well-established principles. The discretion is not reviewable in the absence of a showing of its abuse.".

Moreover, in *United States* v. *Grigalauskas*, supra, *Komer* v. *Shipley*, supra, and *Kansas City Stock Yards Co. of Maine* v. *Anderson*, supra, the Courts of Appeals for the First, Fifth and Eighth Circuits, respectively, at least assumed the necessity of filing a motion for a new trial on the ground that the judgment of the trial court in a non-jury action is excessive, in order to preserve a right of appeal upon the ground of excessiveness. Furthermore, in *Hutches* v. *Renfroe*, supra, and *United States* v. *Fotopulos*, supra, the Courts of Appeals for the Fifth and Ninth Circuits, respectively, have gone further and have held that Rule 59(a) of the Federal Rules of Civil Procedure requires the filing of the motion in such circumstances, for, if the trial court is not given the opportunity to consider the contention that the award is inadequate or excessive, this claimed error is beyond the correcting hand of the federal appellate court.

In the light of these decisions, it is fair to say that when the Court of Appeals for the Fourth Circuit reviewed the $8000 judgments for excessiveness in fact, the review involved an unauthorized assumption of judicial authority. However, as shown below, this usurpation of

authority was mild in comparison to the arbitrary exercise of power involved in the decision to set aside the judgments as "clearly erroneous".

In *State of Maryland, to Use of Burkhardt* v. *United States*, 165 F.2d 869, the Court of Appeals for the Fourth Circuit called attention to the provisions of the Federal Tort Claims Act, 28 U.S.C.A., section 942, now section 2674, as set forth on page 4 of this petition, and then held:

> "This language clearly means that the standards and tests of local law are to determine whether a negligent or wrongful act has been established which is actionable and *the nature and extent of the recovery permitted on account thereof* • • •."

What is the nature and extent of the recovery permitted under Maryland law for the wrongful death of an infant? In *State, Use of Coughlan* v. *B. & O. R. Co.*, 24 Md. 84, the Court of Appeals for the State of Maryland approved the instruction given by the trial judge to the jury as to the damages recoverable under the Maryland wrongful death statute for the death of a 10½-year old boy. The trial judge had instructed the jury that:

> "• • • in estimating the damages, they are confined to the pecuniary damages sustained by plaintiff, and are to give her such a sum as the jury may believe, from all the evidence in the case, will be adequate compensation for the loss of her son's services from the time of his death to the period when, if he had lived, he would have attained the age of twenty-one years."

In *Agricultural and Mechanical Association* v. *State, Use of Carty*, 71 Md. 86, 102, the Maryland Court of Appeals again passed upon and approved this identical instruction to the jury, in the following language:

> "The legal right of the mother to the services of her minor son is referred to as furnishing a safe

basis from which the jury may reasonably infer that she suffered a pecuniary loss by his death and as affording her a reasonable expectation of pecuniary benefit from the continuance of his life during minority."

For a relatively recent appellate approval of the Maryland law as contained in the aforementioned instruction to the jury, see *Assurance Corp.* v. *B. & O. R. Co.*, 173 Md. 238.

And in *State, Use of Cronhart*, v. *Bozman*, Baltimore City Superior Court 1938/591, the trial judge was requested to instruct the jury regarding the measure of "financial loss" which the parents of the deceased child could recover for his wrongful death under the Maryland statute. The trial judge instructed the jury that such loss is "to be measured by such sum as the evidence may show the equitable plaintiff would probably have received in the way of service and financial assistance from the decedent to the time of his majority had he continued to live until he attained the age of 21 years.". This instruction was not contested on appeal. *Bozman* v. *State, Use of Cronhart*, 177 Md. 151.

With the above stated judicial construction of the Maryland wrongful death statute before it in the cases at bar, the Court of Appeals for the Fourth Circuit rejected the only contention made by appellant regarding the damages awarded by the trial court: that the $8,000 judgments were excessive as a matter of law, because the Maryland law prohibited the recovery of more than nominal damages for the death of an infant. But, then the Court of Appeals held that Rule 52(a) of the Federal Rules of Civil Procedure authorized it on its own motion to review the record to determine if the damages awarded by the trial court were "clearly erroneous", that is, excessive in fact; and if it so found, to set them aside; and "to make a finding ourselves on the evidence in the record if

this can reasonably be done.". Thereupon the Court of Appeals reduced each of the trial court's awards for the pecuniary loss to the parents from $8,000 to $5,000.

In *Fairmount Glass Works* v. *Coal Co.*, supra, the Supreme Court reversed a judgment of the Court of Appeals for the Seventh Circuit, which had reversed the trial court's denial of a motion for a new trial. In taking that action, the Supreme Court said:

> "The Court of Appeals has not declared that the trial judge has abused his discretion.".

In view of that statement, it is significant that the Court of Appeals for the Fourth Circuit has not declared that the trial court's findings as to damages in the cases at bar were "clearly erroneous", although in companion cases it so characterized the trial court's awards of damages for the wrongful death of Mr. Guyer and for Mrs. Guyer's personal injuries. However, from the language used in the preface to its opinions, it appears that the Court of Appeals is convinced each $8000 "finding as to damages is clearly erroneous because in excess of any amount justified by the evidence" and that "on the evidence in the record" it is justified in making a finding of $5000 pecuniary loss in each of the Administrator's cases. Accordingly, it becomes necessary to examine the record for evidence bearing upon the amount of "pecuniary damages" recoverable under the above stated judicial construction of the Maryland wrongful death statute.

As shown in the STATEMENT OF THE CASE, the only matters in the record considered by the Court of Appeals to be of probative value on the question of damages, were the ages of the decedents, the Department of Labor statistics showing the present value of the dollar in relation to its value in former years, and the verdicts for the wrongful death of children heretofore approved by rulings of the Maryland courts, as translated into the 1953

dollar. Accordingly, these matters should have been controlling when the Court of Appeals took upon itself the determination of the question whether each of the $8000 awards was excessive in fact. In *Dixie Greyhound Lines Inc.* v. *Woodall,* supra, the Court of Appeals for the Sixth Circuit said:

> "And being further of the opinion that the verdict in the sum of $20,000 was not excessive as a matter of law, *taking into consideration the deceased's age of six years,* • • • *the present value of the dollar, and verdicts in similar causes heretofore approved by rulings of the Tennessee Courts,* • • •;
>
> And there appearing no abuse of discretion on the part of the Trial Judge in overruling appellant's motion for a new trial on the ground that the verdict was excessive; • • •
>
> • • • •
>
> It Is Ordered that the judgment of the District Court be affirmed."

Moreover, the appellant recognized that verdicts in similar cases heretofore approved by rulings of the Maryland Courts should have been more than guides in the determination of whether each of the $8,000 awards were excessive in fact. For in its successful effort to convince the Court of Appeals for the Fourth Circuit that the $131,250 award for the wrongful death of Mr. Guyer was excessive, the appellant said at page 42 of its brief in companion cases:

> "The judgment in this case is erroneous when related to prior recoveries for wrongful death in Maryland. Table B attached lists all judgments for death which counsel for the Government have been able to obtain in the Superior Court of Baltimore City, the Court of Common Pleas of Baltimore City and the Baltimore City Court for a period of 15 years, from 1935 to 1942 and from 1947 to 1953. None of these judgments remotely approach the co-

lossal amount rendered against the United States in this case.

The largest recovery for wrongful death ever obtained in the State of Maryland was in *Griffith* v. *Bethlehem Steel Company* (Baltimore City Court, 1951)."

Table B included each Baltimore City Superior Court and Baltimore City Court verdict for the wrongful death of a minor that had previously been brought to the attention of the trial judge on behalf of the Administrator. And the largest of these verdicts—$10,000—was rendered in *Hoffman* v. *Malinow* (Baltimore City Court, 1939) for the death of a child 3½ years old. Table B also included one other verdict for the wrongful death of a child: *Deshner* v. *Baltimore Transit Co.* (Baltimore City Superior Court, 1953) and that verdict was $6,000.

Furthermore, the Court of Appeals for the Fourth Circuit recognized that in determining whether the damages awarded in the *Guyer* cases were excessive, great weight had to be placed upon verdicts in similar cases heretofore approved by rulings of the Maryland Courts. In justifying its reduction of the award of damages for Mr. Guyer's death from $131,250 to $87,500, the Court of Appeals said:

"• • • but on the whole record we do not think that an award of more than $87,500 for the death of Mr. Guyer can be justified. This is almost one and one-half times as great as the largest wrongful death award ever to be given in the State of Maryland. If the tragic death had occurred twenty-five miles south in the State of Virginia, the award would have been limited by law to $25,000."

When the Court of Appeals wrote its opinion in the cases at bar, in all fairness, it should have added to the foregoing quotation the following:

"Eight thousand dollars is only four-fifths as great as the largest award known to be given in the State of Maryland for the wrongful death of a minor. When the decreased purchasing power of the dollar is taken into consideration, $8,000 is less than one-half as great as the largest award known to be given in the State of Maryland for the wrongful death of a minor. If the tragic deaths of the Snyder children had occurred twenty-five miles south in the State of Virginia, the award for each death, though limited by statute to $25,000, probably would have been in the neighborhood of $20,000. For in the Federal Tort Claims Act case of *Lecompte* v. *U. S.*, Civil Action No. 905, decided November 8, 1954 in the United States District Court for the Eastern District of Virginia, $20,000 was awarded for the wrongful death of an 8½-year old girl."

In any event, in the face of the record—in the face of the verdicts in similar cases heretofore approved by rulings in the Maryland Courts, as viewed in the light of statistics showing the decreased purchasing power of the dollar—it would have been absurd for the Court of Appeals for the Fourth Circuit to characterize the $8,000 judgments as "monstrous", "outrageously excessive" or "shocking to the conscience". (*United States* v. *Grigalauskas*, supra, and *United States* v. *Fotopulos*, supra,). And since there was no testimony considered by the Court of Appeals to be of probative value, "the force and effect of the testimony considered as a whole" could not have convinced the Court of Appeals that each $8,000 finding as to damages "is so against the great preponderance of the credible testimony that it does not reflect or represent the right of the case.". (*Sanders* v. *Leech*, supra,). Likewise, there is no basis in the record for the Court of Appeals holding that on a review of the "entire evidence" it was "left with the definite and firm conviction that a mistake had been committed". (*United States* v. *U. S. Gypsum Co.*, supra,). Moreover, it would have been unreasonable for the Court of Appeals to have declared that

the findings as to damages by the trial court were "clearly against the weight of the evidence or induced by an erroneous view of the law". (*Wright-Bernet* v. *Commissioner of Internal Revenue*, supra,). And it would have been "clearly erroneous" for the Court of Appeals to have held that "there is no basis in the evidence for the conclusion reached" by the trial court, or "in other words" that the awards made by the trial court amounted "to manifest disregard of right and reason". (*In Re 32-36 North State Street Building Corporation*, supra,). Certainly, there was nothing in the record which could have given the Court of Appeals "such convictional certainty" that it did "not feel able to escape the view that the trial court [had] failed to make a sound appraisal of or to accord the proper effect to all of the cogent facts". The strongest basis it could have had for overthrowing the $8,000 findings as to damages was "a mere difference in personal judgment" and this is not enough to declare the findings to be "clearly erroneous". (*Nee, Collector of Internal Revenue*, v. *Linwood Securities Co.*, supra,). In short, there was no affirmative or definite basis in the record for the action taken by the Court of Appeals. As stated in *Golden* v. *Spokane & I.E.R.Co.*, 20 Idaho 526, 118 P. 1076:

> "In an action for the wrongful death of a child, • • •. Upon the question of damages where different minds might honestly and probably would differ and arrive at different results, and nothing inconsistent with the exercise of good judgment appears in the record, the appellate court will leave the verdict as the jury found it. • • •"

In the federal appellate cases here relied upon by the petitioner, there is one other definition of the power conferred upon the federal appellate courts by Rule 52(a) to set aside a finding of fact. In *Sanders* v. *Leech*, supra, it is stated that a federal appellate court "may reverse • • •

under the rule (1) where the findings are without substantial evidence to support them". Comparable language is used in *Brink's, Inc.* v. *Hoyt, supra.* But, it is obvious that this definition has no application to the finding of the amount of damages in an action for the wrongful death of an infant, if the Court of Appeals for the Fourth Circuit was correct in holding, as of no probative value, the testimony that before attaining majority numerous female high school graduates earn $9,100 in the District of Columbia in secretarial positions. And if this testimony had probative value, then it is obvious that it would have been beyond reason for the Court of Appeals to have held that it could reverse the $8,000 findings as to damages, because they "are without substantial evidence to support them".

If judicial authority is needed to support the conclusions set forth in the preceding paragraph, it is found in *Western Union Telegraph Co.* v. *State, Use of Nelson,* supra; *Golden* v. *Spokane & I.E.R.Co.,* supra; and *Dixie Greyhound Lines* v. *Woodall,* supra.

The *Nelson* case involved an action to recover for the wrongful death in Maryland of an 11-year old boy. In answer to the defendant's written interrogatories, the jury found specifically that the value of the boy's services would have been worth an average of $110 per year to his parents above all cost of maintenance, education, etc., from age 11 to 16, and an average of $750 per year above all cost of maintenance, education, etc., from age 16 to 21. Accordingly, the jury returned a verdict in the amount of $4,300. The opinion of the Maryland Court of Appeals in that case does not disclose that any evidence had been introduced in the trial court to assist the jury in answering the interrogatories and thus fixing the amount of damages. If no evidence was introduced in the *Nelson* case regarding the amount of money the deceased boy

could have earned, had he lived until he attained his majority, then it is obvious that the finding as to the amount of damages was without substantial evidence to support it and that the jury fixed the amount of the damages by relying solely upon its own experience and knowledge concerning the value of the services for an average boy between the ages of 11 and 20. On the other hand, if there was evidence introduced in the *Nelson* case regarding the amount of money the deceased could have earned, had he lived until he attained his majority, it is obvious that such testimony must have been of a similar nature to that introduced in the cases at bar through the witness Darnell.

In the *Golden* case, the Supreme Court of Idaho held:

> "In an action for the wrongful death of a child, it is well recognized that the actual benefit that the parent might receive from the services of a child during minority cannot be specifically ascertained to the dollar by the jury, and it is a well recognized rule that the jury should in such cases ascertain as best they can from the evidence introduced, and by using their own judgment, common sense and sound discretion, the value of such services. An estimate of such services must of necessity be a matter of opinion, and * * * no expert testimony on that question would be better than the judgment and common sense of the jury.".

In the *Dixie Greyhound Lines* case, which involved an action for the wrongful death of a 6-year old boy, the Court of Appeals for the Sixth Circuit said:

> "In determining the pecuniary value of the life of the deceased, it was only necessary for the appellee to show by his evidence such facts and data as would furnish a basis from which the jury might approximate the proper amount of damages with reasonable certainty, which burden was met by the appellee * * *.".

In so holding the Court of Appeals for the Sixth Circuit was paraphrasing the language of the decision in *Walkup* v. *Covington*, 18 Tenn. App. 117, 73 S.W.2d 718, wherein it was also held:

> "Manifestly, in the case of a child a little more than 3 years of age, it would be impossible to establish what his earning capacity in the future might be".

In conclusion, it is essential to note that in holding that in the absence of special circumstances establishing the pecuniary value of the life of a child to her parents, $8000 is an excessive amount to award to the parents for the "pecuniary damage" they suffer as the result of the wrongful death of an infant daughter, the Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Covey Gas and Oil Co.* v. *Checketts*, supra; the decision of the Court of Appeals for the Sixth Circuit in *Dixie Greyhound Lines* v. *Woodall*, supra; and the decision of the Court of Appeals for the District of Columbia Circuit in *National Homeopathic Hospital* v. *Hord*, 204 F.2d 397.

In the *Covey* case the action for the wrongful death of an 8-year old son was based upon the Idaho wrongful death statute, 2 Idaho Code, § 5-310, which, like the Maryland statute, had been construed to limit the damages to the pecuniary value of the services the deceased child could have rendered for his parents from the date of his death to the date he would have reached his majority. *Golden* v. *Spokane & I.E.R.Co.*, supra, *Checketts* v. *Bowman*, 70 Idaho 463, 220 P. 682. Moreover, the construction given the Idaho statute in the *Golden* case definitely requires that, in estimating the "pecuniary damages", the costs and expenses of the father for the child's support and maintenance during minority be deducted from the aforesaid value of the child's services. The Court of Appeals for the State of Maryland has not so construed the

Maryland statute. 118 F.Supp. at page 593. In the *Covey* case the jury returned a verdict for $35,407.50 and the District Court denied the defendant's motion for a new trial based upon the ground that the verdict was grossly excessive. On appeal, the Court of Appeals for the Ninth Circuit held that the verdict was "monstrous" *insofar as it exceeded $20,000* and directed the District Court to enter judgment on the verdict for plaintiffs in the sum of $20,000.

In the *Dixie Greyhound Lines* case the action for the wrongful death of a 6-year old boy was based upon the Tennessee wrongful death statute, Shannon's Code § 4025, which limited the damages to the pecuniary value of the services that the deceased child could have rendered for his parents from the date of his death to the date he would have reached his majority and to the voluntary contributions that the child might have made for the support of his parents after he reached his majority. *Davidson Benedict Co.* v. *Severson*, 109 Tenn. 572, 72 S.W. 967; *Walkup* v. *Covington*, supra. *The jury returned a verdict for $20,000.* The District Court overruled the defendant's motion for a new trial based on the ground that the verdict was excessive. In affirming the judgment, *the Court of Appeals for the Sixth Circuit held that the verdict was not excessive as a matter of law and that the trial judge had not abused his discretion in denying the motion for a new trial.* If the Court of Appeals ascribed $12,000 of this verdict to the voluntary contributions that the deceased child might have made to the support of his parents after he had reached his majority, its decision would constitute a holding that $8,000 is not an excessive amount to compensate the parents for the loss of the pecuniary value of the services of a 6-year old boy from the date of his death to the date he would have reached his majority. And if the Court reasoned as the Idaho Supreme Court did in *Golden* v. *Spokane & I.E.R.Co.*, supra, and in the

companion case of the same name reported at 20 Idaho 531, 118 P. 1077, then the Court of Appeals for the Sixth Circuit could not have ascribed as much as $12,000 of the aforementioned verdict to the voluntary contributions the deceased child might have made for the support of his parents after he had reached his majority. In the first *Golden* case the Idaho Supreme Court held in 1911 that a verdict of $4,000 for the wrongful death of Mr. Golden's 7-year old boy was not excessive. But in the second *Golden* case, it held that a verdict of $6,000 for the wrongful death of Mr. Golden's 36-year old unmarried daughter, who worked as a trained nurse for $25 to $35 a week, who lived with her father, and from whom the father might have received considerable voluntary financial assistance if she had lived, was excessive by $2,000.

In the *National Homeopathic* case the action for the wrongful death of a *3-day old son* was based upon the District of Columbia wrongful death statute, Title 16, § 1201 of the District of Columbia Code (1951 Ed.). *The jury returned a verdict of $17,000.* The defendant moved for a new trial on the ground that only nominal damages could be recovered under the statute for the wrongful death of an infant of tender age. In denying that motion, the District Court held that the District of Columbia wrongful death statute required the jury to determine the parents' pecuniary damage, by estimating the pecuniary value of the child's services to his parents during his minority, deducting therefrom the parents' cost of supporting him during minority and adding thereto the amount that he might have contributed voluntarily to their support after reaching his majority. *Hord* v. *Homeopathic Hospital*, 102 F.Supp. 792. *On appeal, the Hospital again contended that the District of Columbia wrongful death statute authorized only an award of nominal damages for the death of an infant of tender age and, accordingly, that the judgment was excessive as a matter*

of law. The Court of Appeals for the District of Columbia Circuit rejected this contention and held that the $17,000 judgment was not so excessive in fact, as to cause the Court to act on its own motion to reduce it. In this connection, it is significant that in *Stewart* v. *Baltimore & Ohio Railroad Co.*, 168 U.S. 445, 18 S.Ct. 105, 42 L.Ed. 537, the Supreme Court had occasion to compare the differences between the District of Columbia and Maryland wrongful death statutes, and said:

> "What are the differences between the two statutes? As heretofore noticed, *the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose.* By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this District the personal representative of the deceased. But neither the State in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. • • •
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> • • • •
>
> Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. *But by each the important matter is the award of damages,* and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. It is true that the beneficiaries of such an action may not in every

case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely to be dependent on the party killed, and the remote relatives can seldom, if ever, be regarded as suffering loss from the death.

We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, should reverse the judgments of the Court of Appeals for the Fourth Circuit, and should affirm the judgments of the United States District Court for the District of Maryland.

Respectfully submitted,

JOHN GEYER TAUSIG
Attorney for Petitioner

SMITH, RISTIG & SMITH,
Of Counsel.

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6840.

United States of America,
Appellant,
versus
Violet S. Guyer and State of Maryland for the use of Violet S. Guyer, Joyce E. Guyer, infant, Frederick I. Guyer, infant, Roslyn M. Guyer, infant,
Appellees.

No. 6841.

United States of America,
Appellant,
versus
Robert R. Bair, Administrator of the Maryland estate of Irvin N. Guyer, deceased, for himself as Administrator and for the use of The Continental Insurance Co., a body corporate,
Appellee.

No. 6863.

United States of America,
Appellant,
versus
Samuel R. Snyder, Administrator of the Estate of Renee Denise Snyder, deceased,
Appellee.

No. 6864.

United States of America,
Appellant,
versus
Samuel R. Snyder, Administrator of the Estate of
Kaye Erin Snyder, deceased,
Appellee.

No. 6865.

United States of America,
Appellant,
versus
Dorothea Snyder,
Appellee.

No. 6866.

United States of America,
Appellant,
versus
Samuel R. Snyder,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

(Argued Nov. 18 and 19, 1954. Decided Dec. 28, 1954.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

George Cochran Doub, United States Attorney, (Herbert F. Murray, Assistant United States Attorney, on brief)

for Appellant, and Norwood B. Orrick and Richard W. Emory for Appellees, in Nos. 6840 and 6841.

Herbert F. Murray, Assistant United States Attorney, (George Cochran Doub, United States Attorney, on brief) for Appellant, and John Geyer Tausig (Smith, Ristig & Smith on brief) for Appellees, in Nos. 6863, 6864, 6865 and 6866.

PER CURIAM:

These are appeals by the United States from judgments rendered under the Federal Tort Claims Act for damages sustained when a government airplane crashed into the residence of Sergeant Samuel R. Snyder, near Andrews Air Base in the State of Maryland. The residence of Sergeant Snyder and its contents were totally destroyed, he and his wife were injured and his two little girls were killed. His brother-in-law Irvin N. Guyer and Mrs. Guyer were in the house at the time and Mr. Guyer was killed and Mrs. Guyer injured. The government's liability for negligence in the operation of the plane is admitted and the only questions in the case are questions as to damages.

In No. 6840, the trial judge gave judgment for $131,250 on account of the death of Mr. Guyer and $33,061.89 for the damages sustained by Mrs. Guyer. In No. 6841 he gave judgment in favor of Mr. Guyer's administrator in the sum of $6,446.23. In No. 6863 and 6864 he gave judgments in the sum of $8,147.50 each on account of the deaths of the Snyder children. In No. 6865 he gave judgment in favor Mrs. Snyder for the sum of $20,152.38, of which amount $14,850 was for personal injuries and the remainder for property damage. And in No. 6866 he gave judgment in favor of Sergeant Snyder in the sum of $20,302.38, of which amount $15,000 was for personal injuries and the remainder for property damage.

While a number of evidentiary questions are presented by the appeals, they go to the weight rather than the admissibility of the testimony to which they relate and none would justify our sending the cases back to the District Court, since we review them on the facts as well as on the law. The real questions in the case relate to the amounts awarded; and, although there has been some discussion in the briefs and at the bar with regard to our power to review the findings of the lower court as to damages, we think there can be no doubt as to our power and duty to review these as we do other findings of fact in cases tried by a judge without a jury. Under Rule 52 of the Federal Rules of Civil Procedure we accept them unless "clearly erroneous"; and a finding is "clearly erroneous" when the "reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395. When convinced that a finding as to damages is clearly erroneous because in excess of any amount justified by the evidence, it is our duty to make a finding ourselves on the evidence in the record if this can reasonably be done.

No. 6840.

Of the $131,250 awarded by the court below on account of the death of Mr. Guyer, $92,100 was awarded his widow, $11,600 to his eldest child, $13,100 to the next child and $14,450 to the youngest. Under the law of Maryland the measure of recovery for wrongful death in a case such as this is the present value of the pecuniary benefit which the wife and children of the deceasd might rasonably have expected to receive from him if he had not been killed. He and his wife had a joint life expectancy of 26.84 years according to the mortality tables. The award of $131,250 was computed on the basis of a contribution

by deceased of $7,500 per year to his wife and children during this period, computing the earning power of money at 3½%. We think that this award, which was more than twice as much as any award in the State of Maryland on account of wrongful death, was clearly erroneous. The deceased was not shown to be a man of a high degree of earning power. Prior to 1946 for about 15 years he had been engaged in operating a trucking business which he gave up in 1946 and operated a service station and then organized an automotive parts business, being half owner at first and then taking over the entire business. There is evidence that for 1948, 1949 and 1950 his gross income was around $10,000 per year, although this was not substantiated by production of books and records. There was evidence that income of around $17,000 was returned for the first three months of 1951, the year of his death, but this spurt in earnings is not adequately explained. Mrs. Guyer testified that they had six or seven hundred dollars a month to live on; and it was on this testimony that the trial judge arrived at the $7,500 per year. Of course, the deceased's living expenses were a substantial part of the living expenses of the family of which he was a part; and, all things considered, we think that $5,000 per year would more nearly approximate the pecuniary loss which his wife and children could reasonably be held to have sustained as a result of his death. Accepting this as a basis, the award should be one-third less, or $87,500 instead of $131,250. Life expectancy, earnings and contribution to family support in a case such as this are largely a matter of speculation; but on the whole record we do not think that an award of more than $87,500 for the death of Mr. Guyer can be justified. This is almost one and one-half times as great as the largest wrongful death award ever to be given in the State of Maryland. If the tragic death had occurred

twenty-five miles south in the State of Virginia, the award would have been limited by law to $25,000.

Of the $33,061.89 awarded Mrs. Guyer $3,061.89 was for medical expenses and personal property loss and is not contested. $30,000 was for personal injuries. The government contends that she should not receive in excess of $10,000. While she is entitled to recover substantial damages on account of the fright and painful injuries that she received, it does not appear that any of her bones were broken or that she sustained any injury to vital organs or any serious disfigurement. There is evidence that she has been rendered nervous and suffers from headaches and that a depigmentation of the skin has been aggravated where she received skin wounds; but she has not received injury resulting in any serious permanent disability and on the whole record we do not think that an award of more than $15,000 on account of her personal injuries is justified and that an award in a greater amount is clearly erroneous.

In appeal No. 6840, therefore, the award of damages on account of the wrongful death of Irvin N. Guyer will be reduced by one-third, i.e. the total award will be reduced to $87,500, and the apportionment of this among the widow and children will be in the same proportions as in the original award. The award of damages to Violet S. Guyer will be reduced to $18,061.89.

No. 6841.

In this case the administrator of Irvin N. Guyer was given a recovery of $5,000 on account of the pain and suffering of deceased prior to his death and $1,446.23 on account of funeral expenses and property loss and damage. While we think that the award for pain and suffering was high, we are not prepared to say it was clearly erroneous in view of the fact that deceased must have

suffered terribly before death came to his relief. The judgment in this case will accordingly be affirmed.

Nos. 6863 and 6864.

These were awards for the deaths of two little girls ages 8 weeks and 6½ years respectively. Funeral expenses in the sum of $147.50 each were not contested. The trial judge awarded the sum of $8,000 each for pecuniary loss to the parents resulting from the deaths of these children. Whether parents will realize any pecuniary benefit from the life of infant children over and above the cost of maintenance and education is highly speculative. The court admitted evidence of the earnings of stenographers, but this had no probative value whatever in the case. We cannot say that the life of a little child is without pecuniary value, although it is practically impossible to determine what the value is. We do not think, however, that an award in excess of $5,000 should be sustained in the absence of a showing of special circumstances establishing pecuniary value not here shown. Of course no decent parent would be willing to lose a child for this or any other sum of money; but this does not mean that he has reasonable expectation of pecuniary benefit from the child's life. Under the Maryland law here applicable it is only such pecuniary benefit that may be recovered. In each of the cases of the minor children the judgment will be reduced to $5,147.50.

Nos. 6865 and 6866.

There is no controversy as to the amount awarded Sergeant and Mrs. Snyder on account of the destruction of their house; contention is made, however, that the award for the destruction of personal property and the personal injuries sustained by Sergeant and Mrs. Snyder is exces-

sive. As to the personal property, it appears that an itemized list of the property destroyed was prepared by Sergeant Snyder and that the various articles were valued on the basis of prices of similar articles appearing in a Sears-Roebuck & Company catalogue, which he testified was less by $500 than the amount actually paid for them. The damages asked on this basis amounted to $8,004.76. The court reduced this because of assumed wear and obsolescence to $6,504.76. While this appears to us to be a high valuation, we do not feel that we would be justified in holding it to be clearly wrong, in the face of a finding by the trial judge who saw and heard the witnesses with regard thereto. Likewise as to the awards for the personal injuries sustained by Sergeant and Mrs. Snyder. They unquestionably received serious and painful injuries accompanied by fright and terror in the dreadful calamity which destroyed their home. Mrs. Snyder is left with permanent impairment of her hearing, some facial disfigurement and 10% general disability as a result of impairment of her nervous system. Sergeant Snyder, who suffered a fractured jaw and other painful injuries, is said to have a 30% mental disability. All of these matters were carefully considered by the trial judge and we cannot say that his findings are so clearly excessive under all the circumstances of the case as to justify us in holding them clearly erroneous on that account; and this we must do before we can substitute our judgment for his. The judgments in Nos. 6865 and 6866 will accordingly be affirmed.

Nos. 6840, 6863 and 6864, *Modified.*

Nos. 6841, 6865 and 6866, *Affirmed.*

JUDGMENT

Filed and entered December 28, 1954

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6863.

United States of America,
Appellant,

vs.

Samuel R. Snyder, Administrator of the Estate of Renee Denise Snyder, deceased,
Appellee.

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, modified by reducing the award therein from $8,147.50 to $5,147.50, and, as so modified, it is affirmed; that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings in accordance with the opiinon of the Court filed herein; and that the costs on appeal be divided.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

ARMISTEAD M. DOBIE
United States Circuit Judge.

JUDGMENT

Filed and entered December 28, 1954

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6864.

United States of America,
Appellant,

vs.

Samuel R. Snyder, Administrator of the
Estate of Kaye Erin Snyder, deceased,
Appellee.

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, modified by reducing the award therein from $8,147.50 to $5,147.50, and, as so modified, it is affirmed; that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings in accordance with the opinion of the Court filed herein; and that the costs on appeal be divided.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

ARMISTEAD M. DOBIE
United States Circuit Judge.

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